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TURNING A BLIND EYE TO BURNOUT MAY PROVE COSTLY

A recent decision of the Ontario Superior Court of Justice (*Zorn-Smith v. Bank of Montreal*, December 2, 2003) is notable for two reasons:

- The Court awarded to the employee $15,000 damages for intentional infliction of mental distress because she had been "burned out" by her employer; and
- The Court did not deduct from the damage award short-term disability benefits received by the employee, on the basis that the benefits claim and wrongful dismissal claim were two separate contractual breaches.

FACTS

Since she was 15 years old, and for 21 years Ms. Zorn-Smith was a hard-working, conscientious and dedicated employee of the Bank of Montreal. More than once she was singled out for her exemplary client service and asked to take on new positions with increasing responsibility. In the latter years the Bank asked Ms. Zorn-Smith to accept the position of Financial Services Manager, a position for which she had unsuccessfully applied previously because, at that time, she lacked sufficient training and experience in financial services and, as the mother of three young children, was unable to complete the many courses required to upgrade her skills.

As Financial Services Manager Ms. Zorn-Smith was required to enrol in the Investment Funds in Canada course and to take courses developed by the Bank, in addition to performing her employment duties, which included developing her branch's book of business. The branch was also severely understaffed and Ms. Zorn-Smith was required to perform more than double the average workload for one person.

Ms. Zorn-Smith's hours of work reflected this chaotic environment: she would work full days at the Bank, often without a lunch break, return home to feed her children, and then return to work until midnight to catch up on paper work or attempt to complete her course work. In addition to the stress she was experiencing at work, her marriage was beginning to suffer.

> "To receive damages for the intentional infliction of mental suffering, the employer must engage in a separate actionable course of conduct which is flagrant or outrageous, calculated to produce harm, and which must result in a visible and provable illness."

On February 3, 2000, Ms. Zorn-Smith applied for short-term disability benefits. She attributed her medical condition to the Bank's demands, and her doctor's diagnosis was "work stress and burn out". Her doctor recommended more realistic work expectations.

Three weeks later Ms. Zorn-Smith returned to work, but the conditions remained unchanged.

In February 2001 Ms. Zorn-Smith again applied for short-term disability benefits. Her symptoms were described as "exhaustion, inability to focus and feeling overwhelmed by everything". Her family doctor said she was "burned out" and characterized her degree of impairment as "total".

Ms. Zorn-Smith's benefits were approved for a period of three months - to May 27, 2001. Describing her concerns as "work place issues", the Bank's medical advisor concluded that Ms. Zorn-Smith was not totally disabled within the meaning of the Bank's disability policy and that her disability would resolve itself within two or three months. The medical advisor reached this conclusion without ever having examined Ms. Zorn-Smith or spoken with her doctor who had made himself available for this purpose.

Ms. Zorn-Smith was advised that she would have to return to work after May 27, 2001, or be deemed to have quit her employment. She was given the option of returning to her regular position, or a less stressful, lower paid position, and advised that she had one month to appeal the decision to end her benefits as of May 27.

On the advice of her doctor, Ms. Zorn-Smith declined to return to work. However, she did not resign her position. On May 28, 2001, the

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Bank took the position that she had quit. She then began an action for wrongful dismissal.

THE DECISION

The Court made a number of important findings:

- The Bank terminated Ms. Zorn-Smith's employment (and as such breached the employment agreement) when it attempted to force her return to work while she was still disabled.
- Requiring Ms. Zorn-Smith to accept a lower rated position was tantamount to constructive dismissal.
- The Bank breached the terms of the disability plan when it cut off benefits as of May 27, 2001. Ms. Zorn-Smith was still disabled at that time. The Bank's medical advisor applied the wrong test: he asked if Ms. Zorn-Smith could return to any job. Under the Bank's benefits plan the appropriate question was whether she could return to her regular job.
- The Bank did not give Ms. Zorn-Smith specific information concerning the appeal process, including detailed instructions as to the documentation being sought and the forms required. The Bank's knowledge of Ms. Zorn-Smith's medical condition, specifically her symptoms of poor concentration and inability to think clearly, added to the obligation to assist her through the appeal process. As such, her failure to appeal the decision to cut off her benefits could not be held against her.

AWARD

The Court concluded that Ms. Zorn-Smith was entitled to a 16-month notice period, including a "Wallace-type" extension awarded on account of the Bank's treatment of her at the time of dismissal. She also received compensation for the loss of value to her RRSP from which she withdrew funds to replace the income she lost as a result of the termination of her employment.

INTENTIONAL INFLICTION OF MENTAL SUFFERING

Typically, a wrongfully dismissed employee is compensated for the employer's failure to give reasonable notice of the termination.

To receive damages for the intentional infliction of mental suffering, the employer must engage in a separate actionable course of conduct which is flagrant or outrageous, calculated to produce harm, and which must result in a visible and provable illness. As such, damages for the intentional infliction of mental suffering are not commonly awarded in wrongful dismissal litigation.

> "The Court found that the Bank had taken advantage of Ms. Zorn-Smith in a callous and outrageous manner."

In this case, the Court held that the elements of the tort were met because the Bank knew that Ms. Zorn-Smith:

- Had requested relief from her workload.
- Had been working long hours

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Breakfast Seminar

Next in our series of employment and labour law update seminars:

TOPIC: Good Governance: Avoiding Criminal Sanctions for Health & Safety Violations

DATE: Thursday, March 11, 2004, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)

VENUE: Toronto Board of Trade Country Club
20 Lloyd Street , Woodbridge , Ontario 416.746.681

HRreview Seminar Series

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without lunch breaks, was exhausted, had suffered a prior burnout, and was an employee likely to put the Bank's interests ahead of her own.

- With the Bank's insistence, had been taking on considerable extra work because the Bank had failed or refused to remedy a severe staff shortage in Ms. Zorn-Smith's branch.

In short, the Court found that the Bank had taken advantage of Ms. Zorn-Smith in a callous and outrageous manner.

DISABILITY BENEFITS

The Court awarded damages for wrongful dismissal without set-off on account of disability benefits.

Typically, because disability payments are contractual in nature, the question of their deductibility from the amount of the wrongful dismissal award turns on an interpretation of the terms of the employment contract and the intention of the parties. In some cases an employee is entitled to receive damages for wrongful dismissal without deducting the disability payments received during the notice period, whereas in other cases an employee's award of wrongful dismissal damages is reduced by the amount received in disability benefits.

Courts generally allow an employee to retain damages and benefits where the employee's benefit plan is held out to be an integral part of the compensation package, or where the employee pays all or part of the benefit premium.

In Ms. Zorn-Smith's case, the Court found that while her benefits were held out to be an integral part of her compensation, the Bank itself (not an insurer) funded the short-term disability plan. The Court resolved these competing positions on the basis that there had been two, separate contractual breaches (breach of the employment agreement and breach of the benefits agreement). That is, because the Bank breached Ms. Zorn-Smith's contractual entitlement to benefits one day before it terminated her employment, two separate contractual breaches had occurred.

EMPLOYERS SHOULD BE AWARE...

Although the facts of workplace abuse in this case are extreme, the decision is significant for a number of reasons:

- The Court would not permit the employer to "turn a blind eye" to the employee's working conditions, particularly where the employee is complaining about a stressful work environment. In this way, the Court may have imposed a requirement on employers to maintain a heightened sensitivity to each employee's emotional circumstances and to adapt the workplace accordingly.
- The Court reaffirmed the employer's obligation to fully canvass all available medical information prior to making a decision to continue employment and/or benefit eligibility.
- The Court reaffirmed an employer's obligation to impose conditions on employees that are consistent with the terms of the benefit plan (i.e. an employer should not require an employee to accept modified work if the disability plan has 'own occupation' criteria).
- The Court potentially created a basis on which an employee may retain both damages for wrongful dismissal and disability benefits without setoff throughout the notice period: that is, where a self-insured employer breaches the benefit plan and subsequently wrongfully terminates the employee, the employee may have a claim for two, separate breaches of contract against the employer.

DID YOU KNOW...?

The Ontario Government is preparing to introduce amendments to the *Employment Standards Act* repealing the right of employers and employees to agree to a work week of up to 60 hours.

We will provide readers with updated information about the amendments, and what they mean to your organization, as it becomes available.

NEW PROVINCIAL PRIVACY ACT REGULATES PERSONAL HEALTH INFORMATION

On December 17, 2003, the Ontario Government introduced comprehensive privacy legislation for the health care sector. Bill 31, the *Personal Health Information Protection Act, 2003* ("PHIPA"), sets standards for the protection of personal health information that will apply to most health care organizations.

PHIPA applies to organizations and individuals that are "health information custodians", including: health care practitioners, providers of long term care, hospitals, psychiatric facilities, health facilities, homes for the aged, nursing homes, care homes, pharmacies, laboratories, ambulance services, homes for special care, and any program for community health where the primary purpose is the provision of health care.

Similar to the Federal Government's commercial privacy law, "PIPEDA", PHIPA regulates the collection, use and disclosure of personal health information by health information custodians. "Personal health information" means identifying information about an individual if the information:

(a) relates to the physical or mental health of the individual, including information that consists of the medical history of the individual's family

(b) relates to the providing of health care to the individual

(c) is a plan of service within the meaning of the *Long-Term Care Act, 1994* for the individual

(d) relates to payments or eligibility for health care in respect of the individual

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance

(f) Is the individual's health number

(g) Identifies a provider of health care to the individual or a substitute decision-maker of the individual

PHIPA is enforced by the Ontario Information and Privacy Commissioner, who has the power to make compliance orders, comments and recommendations to the public. A person affected by an order may commence a proceeding in the Ontario Superior Court to claim damages. PHIPA also contains offence provisions with substantial fines.

Although still untested, PHIPA may affect employers' ability to collect and use medical information in the course of legitimate business activity (i.e. managing absenteeism and/or disability). This is because PHIPA requires express consent for disclosure of personal health information to an employer and restricts the use of the information unless expressly authorized by the employee.

If you would like to discuss how PHIPA may affect your organization, or have questions about this new law, please contact any member of our legal team.

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